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International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 2211/2012

Decision adopted by the Committee at its 113th session (16 March–2 April 2015)

Submitted by:	L.F.
Alleged victims:	The author
State party:	New Zealand
Date of communication:	3 June 2012 (initial submission)
Document references:	Special Rapporteur's rule 92 and 97 decision, transmitted to the State party on 26 November 2012 (issued in document form)
Date of adoption of decision:	30 March 2015
Subject matter:	Fair trial
Procedural issues:	Insufficient substantiation; non-exhaustion of domestic remedies;
Substantive issues:	Equality before the courts and tribunals; right to a defence
Articles of the Covenant:	14 (1) and 14 (3) (d)
Articles of the Optional Protocol:	2; 3; and 5 (2) and (b)

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Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (113th session)

concerning

Communication No. 2211/2012*

Submitted by:	L.F.
Alleged victims:	The author
State party:	New Zealand
Date of communication:	3 June 2012 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 March 2015,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 3 June 2012, is L.F., a national of New Zealand, born on 21 September 1977. He claims that New Zealand has violated his right to a fair trial, which could raise issues under article 14 of the Covenant.[1] He is not represented.

1.2 On 18 April 2013, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided not to accede to the author's request made on 23 March 2013 asking that the State party release him on bail.

1.3 On 18 April 2013, the Committee, acting through the Special Rapporteur, decided to examine the admissibility of the communication separately from the merits.

Facts as presented by the author

2.1 On 22 May 2006, the author was arrested for participating in the import from China into New Zealand of very large quantities of drugs. On 10 December 2008, a High Court jury found him guilty of having methamphetamine in his possession for sale on a specific date. He was also found guilty of possessing weapons without authorization and of selling the unlawful drugs on specific dates. He was sentenced to 19 and a half years' imprisonment with a non-parole period of 8 and a half years.

* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

[1] The author does not specifically mention article 14 of the Covenant.

2.2 During the trial, where the author was appearing with five co-accused, a letter from a juror expressing a social interest in one of the counsels led to the juror's dismissal.[2] The author and his co-accused raised the issue that, even with that juror being discharged, the whole jury formation was tainted with error, as the said juror might have influenced the other jurors (or at least of some of them) as to the innocence or guilt of the accused. During an interview between the judge and the juror concerned, the latter had mentioned that his involvement with a counsel had "no great prejudice" on the conduct of the hearing. For the author and his co-accused, the mere acknowledgment that there had been "prejudice" should have been sufficient for the judge to dismiss the jury and form a new one. Despite these oppositions, the judge decided to pursue the hearings with the remaining 10 jurors.

2.3 Later in the procedure, one of the 10 jurors was absent for two sitting days and then returned.[3] There was no inquiry about the reasons for the absence and no final ruling as to whether the tenth juror was fully capable of discharging his duties. The judge decided to continue the hearings.

2.4 The author and his co-accused appealed the judgment of the High Court on the ground, inter alia, that the trial should not have proceeded with 10 jurors, especially given that one of them had disappeared and reappeared without the accused knowing the reason for the incident. The Court rejected the authors' appeal. With regard to the "tainted" juror, the Court considered that his reference to "no great prejudice" was a matter for the Judge to evaluate, as it could have meant that there was prejudice but that the prejudice was not great or it could have been understood as a laconic statement that there was no basis for concern. The Court considered that there was no ground for challenging the judge's appraisal. With regard to the tenth juror, the Court considered that there was no evidential base for doubt that "a temporary absence of the tenth juror was simply due to a misapprehension as to when the hearing would resume".[4] The Court further noted that, in accordance with section 374 of the Procedure Code, the Court must not proceed with fewer than 11 jurors except, inter alia, if the Court considered that, because of exceptional circumstances in relation to the trial, and having regard to the interest of justice, the Court should proceed with fewer than 11 jurors, and in that case, the trial may proceed with 10 jurors whether or not the prosecutor and the accused consent.

2.5 In the present case, the judge gave reasons for pursuing the trial, including that the case was a complex one, involving six accused facing a total of 41 charges, that the trial was scheduled for 6 weeks but ran over significantly (to 11 weeks); that the issue of the 10 jurors was raised after completion of 9 weeks of trial; that the trial involved a significant investment of time and resources from Police, Customs and Crown and defence counsel was substantial; and that the earliest date for a retrial would be in 2010 and in the meantime all the accused would have to remain in custody. The Court of Appeal rejected the author's

[2] See the transcript of the judgment of the Court of Appeal of New Zealand dated 30 September 2009. In the transcript it is mentioned that the "tainted" juror was discharged after having sought to arrange a social meeting with the counsel of one of the accused after the trial.

[3] According to the Minutes of Courtney J, High Court of New Zealand, Auckland Registry, dated 24 September 2008, the trial judge had decided that the court would not be sitting on Friday 19 September 2008. The tenth juror misunderstood the judge's direction and thought that the court would not be sitting for the previous Thursday or Friday, whereas the judge had said that the court would not be sitting on the Friday only. When not seeing the juror appear on the Thursday, the judge instructed the court staff to locate the juror without success. The Court therefore decided to adjourn the trial from 1 pm Thursday 18 September. By Monday 22 September, the juror had reappeared and, with the consent of both prosecution and counsel, the trial judge decided to reintegrate the juror and resume the trial (24 September 2008, CRI-2006-004-010505).

[4] See Court transcript section 75.

claims. The Court of Appeal also noted that the impossibility of carrying on with the trial with the 10 chosen jurors was not raised by any of the accused at the time of trial. There was therefore no reason why the judge should have departed from her decision to continue with the hearings.

2.6 On 5 April 2011, the Supreme Court rejected the author's application for leave to appeal on the ground that the lengthy delay in bringing the appeal was not adequately explained. The Court agreed that, in the context of a 25-year term of imprisonment, it might be in the interest of justice to extend the time for seeking leave to appeal, despite a substantial delay, provided that an apparent miscarriage of justice was "well arguable". In the present case, the Court considered that there was no such appearance of a miscarriage of justice on the proposed grounds of appeal. Despite the decision, the Supreme Court looked into the ground of appeal and concluded that the Court of Appeal had not erred in its judgment that there had been no miscarriage of justice.

2.7 On 6 June 2011, the author made a formal complaint to the Office of the Judicial Conduct Commissioner about the conduct of the judge of the High Court, who had decided to continue with the hearing with the remaining 10 jurors. His complaint was dismissed on 23 February 2012 on the ground that it was essentially directed towards the validity of the decisions reached and was not related to the judge's conduct as such. His appeal against the decision was also dismissed on 29 March 2012.

The complaint

3. The author considers that by failing to guarantee that his trial would be conducted in conformity with the State party's criminal procedure in relation to the number and quality of jurors forming the jury, the State party has violated his right to a fair trial. He particularly refers to the failure to conduct an inquiry into the absence of the tenth juror for two days; the fact that the Court of Appeal allegedly violated his rights by giving weight to the absence of objection by the defence counsel to resuming the trial; the fact that there was no evidence that the juror was fit to serve following his absence and return; and that there was no transcription of the decision made by the judge trial to resume the trial without further inquiry following the return of the tenth juror.[5]

State party's observations on admissibility

4.1 On 29 January 2013, the State party challenged the admissibility of the communication on the grounds of non-exhaustion of domestic remedies, non-substantiation and incompatibility with the Covenant.

4.2 On the facts, the State party notes that, during the trial before the High Court in July–September 2008, prosecution and defence counsel were consulted. The trial was adjourned on account of the absence of one of the jurors and court staff were directed to locate the absent juror, without success.[6] When the juror returned the next day, it was indicated that he had misunderstood a court direction for a one-day adjournment and was instead absent for two consecutive days. The trial judge asked the prosecution and defence counsel whether any further inquiry was needed and all counsel, including the author's counsel, agreed that nothing more was required and that the trial could resume. The trial

[5] The author does not specify which provisions have allegedly been violated but those allegations relate to article 14 (1) and (3) (d) of the Covenant.

[6] See *R.* v. *Chen HC Auckland* CRI-2006-004-010505 (Rulings No. 10, 18 September 2008, Ruling 11, 19 September 2008 and Summary of High Court Transcript, 19, 22, 23 and 24 September 2008).

judge formally recorded that factual assessment and her decision to resume the trial in a written Minute.[7]

4.3 The author challenged the decision on appeal to the Court of Appeal and in an application for leave to appeal to the Supreme Court. Both courts dismissed the appeal, noting that there had been no request by defence counsel for further inquiry and no objection to the resumption of the trial; that there was nothing to suggest that the juror's absence was due to anything other than a misunderstanding; and that there was nothing to suggest that the juror's absence had undermined the fairness of the author's trial. Following a complaint lodged with the Judicial Conduct Commissioner for misconduct of the trial judges of the High Court, the Court of Appeal and the Supreme Court, the Commissioner dismissed the complaint as disclosing no misconduct.

4.4 The State party considers that the author's allegation of a breach of article 14 (1) by the decision of the trial judge to accept the return of the tenth juror without further inquiry is inadmissible pursuant to article 2 and/or article 3 of the Optional Protocol. The decision to accept the return of the juror with no further inquiry and the resumption of the trial was with the agreement of both prosecution and defence counsel. The State party notes that, both during the trial and in his communication before the Committee, the author did not challenge the fact that the trial judge's decision with regard to the juror was made with the agreement of the author's defence counsel. The author's present communication discloses no basis for reviewing an assessment of those facts.

4.5 The State party's law provides for a range of means of addressing the conduct of jurors, including questioning and, where necessary, discharge of the juror or of the jury as a whole.[8] Such more formal steps had been taken in relation to another juror, who was found to have engaged in inappropriate conduct. Those steps are to be taken in the light of the circumstances and in accordance with the right to fair trial pursuant to section 25 of the State party's Bill of Rights Act. The trial judge acted in accordance with the law, as confirmed by the two appellate courts (the Appeals Court and the Supreme Court). While the communication alleges a violation of the right to a fair trial, no allegation of arbitrariness or manifest error has been alleged.

4.6 The State party refers to the Committee's constant jurisprudence and its general comment No. 32 (2007) on article 14: right to equality before courts and tribunals and to a fair trial, to the effect that the Committee will not revisit findings of fact or of national law, absent arbitrariness, partiality or manifest error.[9] The author's allegations are therefore inadmissible pursuant to article 2 and/or article 3 of the Optional Protocol.[10]

4.7 The State party further contends that the author's allegation is inadmissible on the ground of failure to exhaust domestic remedies, since the author has not alleged, either by way of appeal or in his communication, that his defence counsel acted incompetently, although under the State party's law, this is an available ground for appeal, whereby the accused could be said to have had no effective representation and prejudice would be presumed.[11] The Committee has previously indicated in its jurisprudence that the actions of independent defence counsel will not, absent manifest error, establish a breach of the

[7] Minute of 24 September 2008; see *R.* v. *Chen HC Auckland* (see footnote 6).

[8] Bill of Rights Act 1990, section 25(a).

[9] The State party refers to the Committee's general comment No. 32 (2007) on article 14: right to equality before courts and tribunals and to a fair trial, para. 26.

[10] See communication No. 1758/2008, *Jessop* v. *New Zealand*, Views adopted on 29 March 2011, para. 7.11

[11] See *R.* v. *Sungsuwan* [2006] 1 NZLR 730 (SC).

Covenant.[12] It follows that the communication is also inadmissible pursuant to article 5 (2) (b) of the Optional Protocol as it seeks to raise points not pursued on appeal.

4.8 In respect of the decisions of the Court of Appeal and the Supreme Court, these were based on the assessment that, during the first instance trial, no objection was made to the way in which the matter was dealt with by the judge at trial, nor was there any request to make further inquiries as to the circumstances of the absence of the juror. The State party reiterates that, absent arbitrariness, partiality or manifest error, the author's communication is here again inadmissible under article 2 and/or 3 of the Optional Protocol.

4.9 The Judicial Conduct Commissioner considered that the author had not offered any information supporting his claim that the Court of Appeal acted inappropriately. The fact that the Court did not find in his favour could not be indicative of bias or misconduct by it. The Commissioner held the same view of the author's allegations against the Supreme Court judges. The author has not substantiated the arbitrariness of the decisions of the Commissioner. The Commissioner is responsible for judicial conduct and is not a means of appeal and thus declined various aspects of the author's complaint as appeal matters beyond the Commissioner's jurisdiction.

4.10 The State party refutes the author's allegation that, by making a decision on the juror without his physical presence, the trial judge breached article 14. The author was not present in person because the trial judge, with the agreement of defence counsel, determined that it was not necessary to take any formal steps and the matter did not formally proceed any further. The State party reiterates that the author was professionally and independently represented in the brief judicial conference which the prosecution and counsel defence had with the trial judge. The State party therefore submits that the communication does not substantiate any consequential breach of article 14 (1) and/or article 14 (3) (d) and is therefore inadmissible under article 2 of the Optional Protocol. The author's absence from the judicial conference was also not argued in the author's appeal and is therefore inadmissible pursuant to article 5 (2) (b).

4.11 To the author's allegation that the trial should not have resumed without the author's consent, the State party replies that the author's counsel had in fact agreed, on the author's behalf, to the resumption of the trial; and, in any case, it is not a requirement of the State party's law that an accused person or his or her counsel consent to resumption of a trial in such circumstances. Domestic law may require the consent of an accused person to continue a trial by a jury where more than one juror becomes unavailable.[13] Here, the juror's temporary absence and subsequent return meant that there was no issue of proceeding with an insufficient number of jurors. This aspect is therefore also inadmissible under article 2 of the Optional Protocol.

4.12 As to the contention that the brief judicial conference between the trial judge, the prosecution and counsel defence was not transcribed, the State party reiterates that the decision to reintegrate the juror and resume the trial was made with the agreement of defence counsel; that that decision was communicated by defence counsel to the author; and that the decision was formally recorded by the trial judge in a written Minute and that she had also raised the juror's absence with counsel when it occurred and recorded the position in a written ruling. The State party notes that the absence of a transcript was not raised by the author as a ground for either of his appeals. The author's complaint on this aspect to the Judicial Conduct Commissioner was rejected by the Commissioner, who cited

[12] The State party refers to communication No. 493/1992, *Griffin* v. *Spain*, Views adopted on 4 April 1995, para. 9.8; and communication No. 984/2001, *Juma* v. *Australia*, Admissibility decision of 28 July 2002, para. 7.5

[13] New Zealand Crimes Act 1961, sect. 374.

that Minute. This aspect is therefore unsubstantiated under article 2 and inadmissible under article 5 (2) (b) of the Optional Protocol.

Author's comments on the State party's observations

5.1 On 23 March 2013, the author provided his comments to the State party's observations. The author also made additional claims: a claim based on the alleged unfair judgement made by the High Court in relation to a dispute with the New Zealand Inland Revenue Department;[14] a claim based on the fact that, while being still in pretrial detention, he was compelled to subscribe to a rehabilitation programme in which he did not wish to participate, which he considers to be a violation of his rights. For the reasons above, the author requested the Committee to demand his release on bail while his communication was being considered by the Committee. On 18 April 2013, the Committee did not accede to his request.[15]

5.2 With regard to the admissibility of his initial communication, the author first refutes the State party's account of the way the decision to reintegrate the juror and resume the trial was made. He alleges that the decision was made out of the courtroom, without the accused being informed of its content or of the reason why the juror had not reappeared on the day he was supposed to. In the author's view, the decision was made solely by the judge. The author further contends that there was no real transmission of the information from the defence counsel to the accused but, rather, the author was, along with the other accused, informed of the decision that had been taken to reintegrate the juror without the juror's explanation for his absence.

5.3 The author further considers that the "Judge's Minutes" to which the State party refers cannot be considered as a formal record. The document was never disclosed to the accused during the trial, was never mentioned by either of the appellate courts and was never disclosed to his counsel. The first time the author was informed of the Minutes was when he received the dismissal from the Judicial Conduct Commissioner. The author deplores the timing and the circumstances in which the Minutes surfaced.

5.4 The author contends that, contrary to the State party's assertion, he raised the issue of the absence of the tenth juror in his submission to the Court of Appeal. On that basis, the Court of Appeal should have verified the content of the High Court's transcript in order to verify the existence of the so-called Judge's Minutes on the decision to reintegrate the juror. Nor did the Supreme Court mention such Minutes.

5.5 The author acknowledges the fact that the Judicial Conduct Commissioner cited the so-called Judge's Minutes. The author deplores the fact that this happened at that stage. The Commissioner did not question how the two appellate courts reached a decision without the transcript or the Judge's Minutes. Nor did the Commissioner question the fact that the author was not directly involved in the so-called agreement regarding the reintegration of the juror.

5.6 The author contends that the so-called agreement made between the judge, the prosecution and the defence counsel was made without consulting the accused. Since such a decision directly affects the accused, they should have been consulted. The author therefore considers that his defence counsel at the first instance stage acted without his guidance and under the direct influence of the trial judge.

[14] The author does not provide more information on the reason for the dispute, nor does he give a copy of the court's decision or any information on how this issue relates to his claim as expressed in his initial communication dated 3 June 2012.

[15] See para. 1.2 above.

5.7 The author considers that the juror's disappearance was suspicious since he could not be contacted or located by the Court staff, which breached the regulations binding all jurors. So when the juror reappeared, the Court should have at the very least inquired about the disappearance.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5 (2) (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's challenge to the admissibility of the author's entire communication on the ground of non-substantiation in that the decisions of the Court of Appeal and the Supreme Court were based on the assessment that, during the first instance trial, no objection was made to the way in which the matter was dealt with by the judge at trial, nor was there any request to make further inquiries as to the circumstances of the absence of the juror. The Committee takes note of the author's arguments mainly relating to the fact that he was not properly informed of the decisions affecting him during the first instance trial, which had consequences on his ability to make effective appeals throughout the proceedings, thus violating his right to a fair trial.

6.4 The Committee recalls its jurisprudence that it is incumbent on the courts of States parties to evaluate the facts and the evidence in each case, or the application of domestic legislation, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.[16] The Committee has examined the materials submitted by the author, including the decisions of the High Court, the Appeals Court and the Supreme Court, and is of the opinion that those decisions do not provide sufficient evidence to support the conclusion that the court proceedings suffered from such defects. The Committee further observes that the defence counsel was privately retained by the author and that his alleged failure to properly represent him during the first instance trial cannot be attributed to the State party.[17] Accordingly, the Committee considers that the author has failed to provide any substantiation of his claims of a violation of article 14, and that the communication is therefore inadmissible under article 2 of the Optional Protocol.

7. Therefore, the Human Rights Committee decides:

(a) That the communication is inadmissible pursuant to article 2 of the Optional Protocol; and

(b) That the present decision shall be communicated to the author and to the State party, for information.

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[16] See, inter alia, communication No. 1622/2007, *L.D.L.P.* v. *Spain*, decision adopted on 26 July 2011, para. 6.3.

[17] See communication No. 867/1999, *Smartt* v. *Guyana*, Views adopted on 6 July 2004, para. 5.4.